AHMAD ZAKI ISMAIL

v.

BANK PERTANIAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
RAHMAH HUSSAIN J
[SUIT NO: S4-22-333-92]
15 AUGUST 2001

ADMINISTRATIVE LAW: *Remedies - Declaration - Application for - Whether abuse of the process of the court - Bank Pertanian Act 1969*

LABOUR LAW: *Employment - Disciplinary proceeding - Dissatisfaction with decision of disciplinary committee - Remedy available - Whether appeal to court proper procedure - Bank Pertanian Act 1969*

The plaintiff at the material time was a loan supervising officer in the employ of the defendant. The defendant is a statutory body set up by an Act of Parliament, namely the Bank Pertanian Act 1969.

By letters dated 15 March 1991 and 25 March 1991, the plaintiff was suspended from work with full pay pending an inquiry into the charges levelled against him. A domestic inquiry was conducted by the disciplinary committee and by letter dated 6 March 1992, the plaintiff was informed that the disciplinary committee found him guilty as charged and issued a warning against him.

The plaintiff claimed for two declarations, namely (a) that the plaintiff's suspension of service from the defendant is null and void and of no effect; and (b) that the decision of the disciplinary committee against the plaintiff is null and void, and of no consequences.

The plaintiff raised three issues, namely that (a) he was not afforded an opportunity to be represented by counsel; (b) he was not given an opportunity to mitigate before sentence was meted out; and (c) no reasons were given for the imposition of the penalty.

The defendant's contention was based on the Bank Pertanian Act 1969, where the plaintiff should have appealed to the board instead of seeking these declarations.

Held:

[1] It is undoubtedly good law that where a statute creates a right and gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal and not to others. (p 83 b)

[1a] It was therefore an abuse of the process of the court for the plaintiff to seek to by-pass the statutory provision of domestic appeal in the Bank Pertanian Act 1969 by coming to this court to claim the two declarations. (p 85 g)

[Plaintiff's claim dismissed.]

Case(s) referred to:

*Electrical Industry Workers Union v. Registrar of Trade Unions & Anor [1976] 1 MLJ 177 (**foll**)*

*Enderby Town Football Club v. The Football Association Ltd & Anor [1971] 1 Ch 591 (**foll**)*

*Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 (**refd**)*

*Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487 (**dist**)*

*Teh Guan Teik v. Inspector General of Police [1998] 3 CLJ 153 (**refd**)*

*V Govindaraj v. President, MIC [1984] 1 MLJ 190 (**dist**)*

*Wilkinson v. Barking Corporation [1948] 1 KB 721 (**foll**)*

Legislation referred to:

Bank Pertanian Act 1969, s. 10B(8)

For the plaintiff - Manoharan; M/s Karpal Singh & Co

For the defendant - Mazlinda; M/s Ng Yook Woon, Andrew TC Saw & Co

Reported by Mariette Peters-Goh

JUDGMENT

Rahmah Hussain J:

The plaintiff in this case claims *inter alia* for two declarations:

(a) that the plaintiff's suspension from service as a loan supervising officer *vide* letters dated 15 March 1991 and 25 March 1991 from the defendant is null and void and of no legal effect; and

(b) that the decision of the disciplinary committee (DC) against the plaintiff is null and void, inoperative and of no consequence.

The agreed facts of this case are as follows:

1. The plaintiff at the material time was a loan supervising officer in the employ of the defendant;

2. The defendant is a statutory body set up by an Act of Parliament namely, Bank Pertanian Act 1969 ("the Act");

3. By letters of 15 March 1991 and 25 March 1991 the plaintiff was suspended from work with full pay pending inquiry into the charges levelled against him;

4. By a letter of 13 June 1991 the defendant informed the plaintiff of its decision to hold a domestic inquiry ("D1") to inquire into the charges levelled against him;

5. On 22 October 1991 a fresh D1 was conducted by a disciplinary committee ("DC") set up under s. 10B of the Act; and

6. By a letter of 6 March 1992 the plaintiff was informed that the DC found him guilty as charged and issued a warning against him.

At the outset it was agreed between the parties, that as the issues before this court pertain to law, namely the law of declaration and its application in cases of employment, they would not call witnesses but would submit instead on the law and that this would conclusively decide the whole case one way or the other.

In his submission, learned counsel for the defendant states that since the alternative remedy of the statutory procedure is clearly prescribed by the Bank Pertanian Act 1969 (hereinafter referred to as "the Act"), the plaintiff should not have sought these declarations and bypass that remedy.

Learned counsel then refers to s. 10B of the Act which provides as follows:

10B. Discipline of Officers and Employees

(1) There shall be a Disciplinary Committee of the Bank which shall consist of two members to be elected by and from the members of the Board, one of whom shall be elected chairman, and the General Manager appointed under section 10(1).

(2) ...

(3) ...

(4) The General Manager shall not be a member of the Disciplinary Committee in any proceedings before it in which he is the complainant; his place shall be taken by a member to be elected by and from the members of the Board.

(5) ...

(6) ...

(7) ...

(8) Any officer or employee of the Bank who is dissatisfied with the decision of the Disciplinary Committee or of any committee delegated with functions, powers or duties under subsection (6) may, within fourteen days, appeal in writing against such decision to the Board which may thereupon affirm, reverse or give such directions on the matter as it deems fit and proper.

(9) The decision of the Board upon such appeal shall be final.

In support of his submission learned counsel then refers to several authorities namely *Wilkinson v. Barking Corporation* [1948] 1 KB 721 at p. 724 where Asquith LJ in his judgment said as follows:

> It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others. As the House of Lords ruled in *Pasmore v. Oswaldtwistle U.D.C.* [1898] AC 387, 394 (per Lord Halsbury): 'The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.'

and *Electrical Industry Workers Union v. Registrar Of Trade Unions & Anor* [1976] 1 MLJ 177 wherein our own Federal Court adopted a similar approach in a case where statute gives a specific remedy.

Learned counsel for the plaintiff on the other hand refers to the case of *Teh Guan Teik v. Inspector General Of Police* [1998] 3 CLJ 153 wherein the Federal Court unanimously held *certiorari* and declaration were not mutually exclusive and were concurrent remedies. Peh Swee Chin FCJ (as he then was) had this to say:

> I would like to make a general observation before I end this judgment of mine, ie, that a claim for a declaration is a very efficient remedy for an aggrieved citizen against *ultra vires* actions of all public authorities or governmental bodies. It has no coercive force by itself, *inter alia*, so that no such government body need feel the threat of such force. Thus, if a person's rights are affected by an order from such a public authority, he can sue for a declaration of the impropriety of the said order and if he succeeds, he can ignore the said order with impunity; see *Dyson v. Attorney General* [1911] 1 KB 410; or if a government servant categorised under art. 132 of the Federal Constitution is dismissed from his post, he can claim a declaration that he still holds it. See *Surinder Singh Kanda v. Government of Federation of Malaya* [1962] MLJ 169.

Learned counsel also refers to the case of *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 wherein the Supreme Court held that the discretion was still with the courts but where there is an appeal provision available to the applicant, *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the rules of natural justice.

Thus in this case he says it is therefore necessary to peruse the statement of claim to determine whether there can be established a serious breach of the rules of natural justice. In para. 8, the plaintiff asserts he was not afforded an opportunity of being represented by counsel thereby leading to contravention of natural justice.

In para. 9 of the statement of claim, the plaintiff adverts to contravention of the rules of natural justice in the conduct of the disciplinary proceedings in that the plaintiff was not given an opportunity of making a plea in mitigation before punishment was imposed on him. (See *V Govindaraj v. President, MIC* [1984] 1 MLJ 190).

In para. 10 of the statement of claim the plaintiff pleads there was further breach of the rules of natural justice in that the disciplinary committee did not give reasons for imposing the penalty it did. (See *Rohana Bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487).

In reply to the three issues raised by learned counsel for the plaintiff, firstly, that the plaintiff was not afforded an opportunity to be represented by counsel; secondly, that he was not given an opportunity to mitigate before the 'sentence' was meted out; thirdly, that no reasons were given for the imposition of the penalty, learned counsel submitted that in respect of the second issue (that is that the plaintiff was not given an opportunity to mitigate before the 'sentence' was meted out) the plaintiff was present throughout the inquiry. Therefore if he had intended to make a plea in mitigation after he was found guilty as charged, he should do so then. If indeed his attempt to speak in mitigation had been unreasonably prevented or prohibited by the members of the disciplinary committee, thereby coming to their decision without having first heard his mitigation, the plaintiff could have exercised his right as given under s. 10(B)(8) of the Bank Pertanian Act 1969 ("the Act") to appeal in writing to the board. Even this the plaintiff did not do.

After all, he added, in this case the disciplinary committee only meted out the most lenient and fair punishment possible by way of a mere warning instead of imposing the severe punishment of dismissal.

Learned counsel for the defendant then went on to distinguish the case of *V Govindaraj (supra)* from the present case. He said, in the former, the plaintiff as found by the court, had exhausted his domestic remedies and it was therefore proper for him to seek redress in the court for the declaration (at pp. 192 and 193 paras. 1 right-hand column A left-hand column). Furthermore, it was in the appeal to the central working committee where, it was said, the plaintiff was not given an opportunity to plead in mitigation, and it was in view of the seriousness of the penalty imposed on the plaintiff

especially when the plaintiff was the vice president of the M.I.C. (please see p. 199, paras. E and F at the right-hand column) that the learned judge held (at p. 201, paras. G, H & I right-hand column) that failure on the part of the central working committee to give him an opportunity to plead in mitigation during the hearing of his appeal is contrary to principles of natural justice.

As regards the third issue, that no reasons were given for the imposition of the penalty, it was submitted on behalf of the defendant, firstly that it is not an accrued right of the plaintiff to be entitled to the "reasons" that he alleges were not conveyed. Secondly, the plaintiff did not request for such "reasons" to be furnished until this late stage. Thirdly, the plaintiff never did exercise his right of appeal which was readily available to him under the Act.

Touching on the authority cited by learned counsel for the plaintiff to support the contention for "a duty to give reasons" in *Rohana Ariffin (supra)* learned counsel for the defendant submitted that it is distinguishable. In that case, the application ie, for *certiorari* to quash the decision of the council of the respondent university ("the council"). The applicant in *Rohana*'s case had indeed exercised her right of appeal to the council from the decision of the disciplinary authority whilst the plaintiff in the present case did not exercise his right of appeal to the board when there is clearly a right of appeal as given under s. 10(B)(8) of the Bank Pertanian Act 1969 ("the Act").

Lastly in respect of the first issue that the plaintiff was not afforded an opportunity to be represented by counsel, learned counsel for the defendant reiterated that in the present case, the plaintiff had not exercised his right of appeal and the legal representation before a domestic inquiry may not be claimed as of right. He then relied on the authority of *Enderby Town Football Club v. The Association Ltd & Anor* [1971] 1 CH 591 wherein Lord Denning said that there is no absolute right of legal representation before a domestic tribunal.

After giving due consideration to the submissions of both learned counsel and the surrounding circumstances of this case it is my considered opinion that it is an abuse of the process of court for the plaintiff to seek to by-pass the statutory provision for the procedure of domestic appeal in the Bank Pertanian Act 1949, by coming to this court to claim the two declarations as stated in para. 12 of the statement of claim. As such I dismissed the plaintiff's claim with costs.